Supreme Court, U.S.
FILED
MAR 2 2000
CLERK

(3)

No. 99-939

IN THE
SUPREME COURT OF THE UNITED STATES

FRED H. GOODSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fifth Circuit

REPLY TO BRIEF IN OPPOSITION

WILLIAM H. JEFFRESS, JR.
Counsel of Record
PAUL F. ENZINNA
Miller, Cassidy, Larroca &
Lewin, L.L.P.
2555 M Street, N.W.
Washington, D.C. 20037
(202) 293-6400
Attorneys for Petitioner

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In reply to the United States' Opposition to his Petition for Certiorari, Fred H. Goodson respectfully adopts and incorporates, as if fully set forth herein, the Reply in Opposition of co-petitioner Carl Cleveland, filed February 22, 2000 (#99-804). In addition, Mr. Goodson replies as follows to the government's erroneous contention that he waived his right to contend that the District Court erred in concluding that the video poker licenses were "property" under 18 U.S.C. § 1341.

In opposing Mr. Goodson's petition for certiorari, the government asserts that in his appeal to the United States Court of Appeals for the Fifth Circuit, Mr. Goodson did not "properly develop[ed] [the argument that the video poker licenses were not 'property' under 18 U.S.C. § 1341] under Federal Rule of Appellate Procedure 28(i) and had improperly attempted to adopt petitioner Cleveland's argument." *Government's Brief in Opposition* at 6 n.2.

Federal Rule of Appellate Procedure 28(i) provides, in pertinent part, that "[i]n a case involving more than one appellant . . . any party may adopt by reference a part of another's brief." That is precisely what Mr. Goodson did in his Fifth Circuit brief with regard to the "license as property" issue, when he stated that he "adopt[ed], to the extent applicable, the arguments raised by his co-appellants." *Brief for Appellant Fred H. Goodson* at 2. When the Fifth Circuit's opinion omitted Mr. Goodson from its statement that "Maria Goodson and Attorney Cleveland assert that a Louisiana video poker license is not 'property' for purposes of the mail fraud statute," Pet. App. 17a, Mr. Goodson promptly requested that that court correct its opinion to reflect his raising of the issue. Without comment, however, the Fifth Circuit "declined to amend the opinion."

The government here offers no authority for its contention – which was not adopted by the Fifth Circuit – that the language Mr. Goodson used to adopt his co-appellants' argument on this issue was insufficient to preserve this issue under Rule 28(i). In opposing Mr. Goodson's motion below, the government cited *United States v. Zannino*, 895 F.2d 1 (1st Cir. 1990), but that decision is inapposite. In that "La Cosa Nostra" racketeering case, involving "a number of racketeering, loansharking and gambling violations," the appellant had been granted a severance and tried separately from his co-indictees. *Id.* at 3.

In addition, the cases were separately briefed in the court of appeals. *Id.* n.1. Zannino's co-indictees "raised a series of issues which relate to their separate trial in ways not readily transferable to Zannino's circumstances." *Id.* at 17. By contrast, Fred Goodson and his co-appellants were indicted and tried together, on a single set of facts. The issue Mr. Goodson raised by reference applies to his case in exactly the same fashion that it applies to Mr. Cleveland and Maria Goodson.

Moreover, the Courts of Appeals are empowered to extend relief even to an appellant who, unlike Mr. Goodson, fails utterly to raise an issue on appeal, where to do otherwise would be unjust, and particularly where the issue is fully briefed by another party, and where there is no prejudice to the appellee. *See United States v. Allen*, 127 F.3d 260, 264 (2d Cir. 1997) (extending to appellant benefit of argument not raised by appellant where "the issue was raised in the briefs and the Government would not be prejudiced by our consideration of it"). The question whether a license may constitute "property" was extensively briefed by Mr. Goodson's co-appellants and the government fully availed itself of the opportunity to respond to that argument.

In *Government of Virgin Islands v. Brathwaite*, 782 F.2d 399 (3d Cir. 1986), the court found that the defendants' prosecution for drug offenses under both federal and Virgin Islands law was impermissible under *Blockburger v. United States*, 284 U.S. 299 (1932), and vacated their sentences. The court vacated the sentence of one defendant who had failed to argue this point, holding that:

> [T]o afford one coconspirator relief from multiple sentences without extending the same relief to another coconspirator who received identical sentences would be "at

> best unseemly and at worst a miscarriage of justice."

Id. at 408 (*quoting United States v. Bradsby*, 628 F.2d 901, 906 (5th Cir. 1980)). By arguing that Mr. Goodson has waived his right to raise this issue, the government seeks the same "unseemly" result here. Mr. Goodson and his co-appellant Carl Cleveland are serving identical 121-month sentences for their roles in the conspiracy alleged in this case. To deny Mr. Goodson any relief that his co-appellants might obtain on the ground that the licenses at issue here were not "property" would be patently unjust.

CONCLUSION

For the foregoing reasons, and for the reasons stated in his Petition for Certiorari, Mr. Goodson's Petition for Certiorari should be granted.

Respectfully submitted,

WILLIAM H. JEFFRESS, JR.
(counsel of record)
PAUL F. ENZINNA
MILLER, CASSIDY,
LARROCA & LEWIN, L.L.P.
2555 M Street, N.W.
Washington, D.C. 20037
(202) 293-6400

Attorneys for Petitioner
Fred H. Goodson

March 2, 2000